No. 93-489

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

O'MELVENY & MYERS, A LAW PARTNERSHIP,
*Petitioner,*

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR AMERICAN DIVERSIFIED SAVINGS BANK,
ADC FINANCIAL CORPORATION, AMERICAN
DIVERSIFIED/WELLS PARK II, AND AMERICAN
DIVERSIFIED/GATEWAY CENTER,
*Respondents,*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## *AMICUS CURIAE* BRIEF OF BURCH & CRACCHIOLO, P.A. IN SUPPORT OF THE POSITION OF PETITIONER O'MELVENY & MYERS

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Pursuant to Rule 37, Rules of the Supreme Court, the Phoenix, Arizona law firm of Burch & Cracchiolo, P.A. ("B&C"), hereby files this *amicus curiae* brief in support of Petitioner's Writ of Certiorari in the above-captioned case. The written consents of Petitioner and Respondent to the filing of this brief have been obtained and filed with the Clerk.

## INTEREST OF *AMICUS CURIAE*

Neither B&C nor any of its clients has any direct pecuniary interest in the underlying lawsuit between Respondent and Petitioner. B&C's interest in the lawsuit derives from its representation of several attorneys, professional organizations and individuals in lawsuits brought by the FDIC/RTC in the aftermath of the collapse of Arizona's real estate economy. B&C has read the petition for review and believes that the accompanying memorandum provides an important additional perspective on the important issues presented in this case.

## ARGUMENT FOR GRANTING THE WRIT

### I. *THE NINTH CIRCUIT'S RULING IS CAUSING CONFUSION FOR LITIGANTS AS WELL AS ATTORNEYS WHO CONTINUE TO REPRESENT INSURED INSTITUTIONS*

Over the last five to six years, virtually every major savings and loan in the State of Arizona has failed. The FDIC and RTC have responded by bringing claims against many of the most reputable transactional attorneys in Arizona, in most cases alleging that the defendant attorney or law firm should bear full responsibility for failing to prevent the savings and loan client from entering into specific loans or transactions. In these lawsuits the FDIC/RTC is using the decision in *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992), especially Part IV(B) of the opinion, to assert a new and unwarranted federal duty of investigation and disclosure owed by an attorney to the FDIC/RTC.

By suggesting that federal substantive law may effectively prevent imputation to the FDIC/RTC of facts known to and advice received by the institution's officers and directors, the *O'Melveny & Myers* decision threatens to negate decades worth of state law decisions protecting attorneys from negligence claims brought by fully informed and advised corporate clients. *O'Melveny & Myers* sweeps away state law in favor of a sketchily defined retroactive duty of care which suggests, for the very first time, that it is not enough for an attorney to provide competent and complete advice to an insured institution's authorized officers.

Already the FDIC/RTC is using *O'Melveny & Myers* to argue that attorneys for insured institutions effectively owe duties of disclosure and care to the federal regulators themselves. According to the FDIC/RTC's reading of *O'Melveny & Myers*, it is not enough for an attorney to make frank and full disclosure of legal risks to the controlling officers of the institution because the FDIC/RTC need not be bound by such disclosures once it takes over the institution's affairs. Under this reading, an attorney can only obtain complete protection from later suit by the FDIC/RTC by reporting directly to the FDIC/RTC whenever the attorney perceives that the insured client is undertaking a potentially risky transaction or exercising business judgment in a manner that the attorney may question.

Read this way, the *O'Melveny & Myers* decision is causing damage not only by creating confusion in pending professional liability suits, but also by creating uncertainty for those attorneys who currently provide routine services to insured institutions. For example, consider the situation of an Arizona attorney asked by the key officers of an insured institution to document what appears to be a legal but potentially risky loan transaction. Under the well-established law of Arizona and most other states, an attorney may advise her client's agents of the perceived legal consequences of the transaction, but she has no duty to second guess the business judgment of the client's officers, no duty to stop the client from consummating the loan, and no duty or right to report the client's intended actions to the federal regulators.



The *O'Melveny & Myers* decision obscures the otherwise clear guidance of Arizona law by suggesting that if the insured institution is eventually placed in receivership, the FDIC/RTC may sue the institution's attorney unfettered by any imputation to it of the warnings and advice previously rendered by the attorney. Indeed, the attorney's only sure protection from this sort of suit by the FDIC/RTC – short of abandoning representation of insured institutions altogether – is to file a report with the federal regulators describing the institution's intended transaction and the attorney's reservations. To make matters even more confusing, the same "whistle-blowing" mandated by the FDIC/RTC's interpretation of *O'Melveny & Myers* would likely expose the attorney to a malpractice action under Arizona law for breach of confidence.

In short, the *O'Melveny & Myers* decision represents not only a conflict of law among the federal Circuits, but also an unjustified displacement of established state law schemes of professional regulation upon which attorneys, including those in Arizona, have justifiably relied.

## II. *THE NINTH CIRCUIT'S RULING CURRENTLY IMPACTS HUNDREDS OF PENDING LAWSUITS INVOLVING BILLIONS OF DOLLARS IN ALLEGED DAMAGES*

The Court should not wait for further Circuit Court of Appeals decisions to address the conflict that has already emerged between the Fifth and Ninth Circuits. The FDIC and RTC currently have hundreds of malpractice suits on file, alleging many billions of dollars in damages, against accounting and legal professionals in states like Arizona and California.

The great majority of these cases involve the assertion of imputation defenses similar to those struck down by the Ninth Circuit on the basis of its newly created federal substantive law. All of these cases will be settled or tried within the next few years under the shadow of the *O'Melveny & Myers* decision unless it is overturned.

## CONCLUSION

B&C knows of no similar attempt by any court to define or impose a federal law duty of care for state-licensed and trained attorneys. Traditionally, the licensing and regulating of the conduct and duties of attorneys have been left to the States. The Ninth Circuit, without support or precedent, has unwisely jettisoned this large body of law and regulation in favor of a newly announced federal duty designed solely to enhance the ability of the FDIC/RTC to sue and reach insured third party professional defendants. The *O'Melveny & Myers* decision thus raises issues that go to the heart of federalism. If the decision stands it will create enormous confusion not only in pending FDIC/RTC litigation suits against attorneys and their law firms, but also for those law firms currently representing financial institutions. Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted this 28th day of October, 1993.

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